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RECOGNITION OF LABOR UNIONS IN A COMPARATIVE CONTEXT: HAS THE UNITED KINGDOM ENTERED A NEW ERA?

JARED S. GROSS*

INTRODUCTION

The United Kingdom's experience with collective rights in the workplace has lived in its own niche, distinguishable from both the European and American experiences.¹ Specifically, British labor and employment law has traditionally been based upon the notion that employers and employees should be free to bargain over terms and conditions of employment without any legal interference.² On the other hand, American private sector trade unionism is governed by a substantial statutory scheme, namely, the National Labor Relations Act ("NLRA").³

The NLRA arose at a time of social unrest, "and was based on a recognized need to redress the fundamental inequality of bargaining power between labor and management."⁴ The overarching pillars of the NLRA, which is administered by the National Labor Relations Board ("NLRB" or the "Board"), are "majority rule in an appropriate unit through a system of exclusive bargaining representative status for the union which prevails through a ballot conducted by the

* J.D. Candidate, The Ohio State University Michael E. Moritz College of Law, 2003; B.A., The Ohio State University, 1999. Thanks to Professor James J. Brudney for helping me formulate and develop this topic. This note is dedicated to Nicole Marie Crum—my best friend, confidant, colleague, and most importantly my bride.

1. Hazel Oliver, *Trade Union Recognition: "Fairness at Work"?*, 20 COMP. LAB. L. & POL'Y J. 33, 33 (1998).

2. *Id.*

3. 29 U.S.C. §§ 151–169 (2000). The most important amendments are the Labor Management Relations Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–187 (1994)), and the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

4. James J. Brudney, *Of Labor Law and Dissonance*, 30 CONN. L. REV. 1353, 1353 (1998) (arguing that the "persistence of the inequality six decades later" is in a large part explained by the federal judiciary's treatment of the NLRA).

Agency or through some other arrangement, or on a voluntary recognition basis.”⁵

For the United Kingdom, the *Fairness at Work* White Paper (“FAW”) set out the framework for the pursuit of modern companies and laid the foundation for the creation of an enterprise economy by introducing an industrial relations settlement that aims at building a fair and prosperous society.⁶ This settlement provides that through dialogue, employers and workers will establish a partnership⁷ rather than an adversarial relationship; thus, engendering a mutually supportive relationship.⁸ Prompted by these ideas, labor relations in the United Kingdom are changing. On July 27, 1999, the Employment Relations Act (“ERA”), the “Labour Government’s flagship employment legislation,”⁹ received Royal Assent,¹⁰ introducing a plethora of changes to the then current labor and employment law regime.¹¹ Notable among the changes is a scheme for mandatory recognition of trade unions.¹²

This Note focuses on the technical aspects of union recognition and how the United Kingdom’s newly enacted scheme measures up to America’s aged statutory scheme. The multitude of issues that arise

5. William B. Gould IV, *Recognition Laws: The U.S. Experience and Its Relevance to the U.K.*, 20 COMP. LAB. L. & POL’Y J. 11, 13 (1998). However, Board-conducted elections represent the vast majority of elections. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1537 n.41 (2002); see generally Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993).

6. FAIRNESS AT WORK, 1998, Cm. 3968, foreword, <http://www.dti.gov.uk/er/fairness/fore.htm> [hereinafter FAW].

7. The goal of FAW, as provided in the foreword, is that it is part of a program “to replace the notion of conflict between employers and employees with the promotion of partnership.” *Id.* But see Brian Towers, ‘... the most lightly regulated labour market ...’ *The UK’s Third Statutory Recognition Procedure*, 30 INDUS. REL. J. 82, 92 (1999) (stating that “[e]ven in the ‘strike-prone’ 1970s, 98 percent of all employees never experienced a strike over an entire working life ... and ‘conflict’ is far from an appropriate term to apply to current British industrial relations”).

8. TONIA NOVITZ & PAUL SKIDMORE, FAIRNESS AT WORK 15, 76 (2001) (stating that the partners will meet, talk, and attempt to resolve their differences themselves).

9. TRADES UNION CONGRESS, TUC SUBMISSION TO THE GOVERNMENT: REVIEW OF THE EMPLOYMENT RELATIONS ACT 1999 para. 1 (2001), (on file with author) [hereinafter TUC].

10. “Royal Assent” is generally declared by both houses of Parliament by their Speakers, although technically given by the reigning monarch. UK PARLIAMENT, ROYAL ASSENT, at <http://www.parliament.uk/parliament/guide/newassnt.htm> (last modified June 2002). Royal Assent has not been refused by a monarch since 1707, when Queen Anne refused to give it for a bill calling for the settling of the militia in Scotland. *Id.*

11. Employment Relations Act (ERA), 1999 c. 26 (Eng.).

12. ERA c. 26 §§ 1, 5, 6, sched. 1.

after recognition, such as the rights of individual union members, union security agreements, replacement of workers, and so on, are beyond the scope of this Note. The most fundamental issue with respect to union recognition is determining why the United Kingdom enacted such a procedure. Is it a radical departure from the past that establishes a new dawn of union power, or is it a limited departure from the Conservatives' approach to industrial relations? This Note argues that there is no new dawn for unions; rather, the ERA falls into the latter category. That is not to say that the ERA merely provides lip service to British unions. In fact, the ERA will no longer permit completely belligerent employers to refuse recognition under all circumstances.

Part I of this Note describes the importance of recognition for unions. For a time, British unions fared well without a statutory recognition scheme and preferred the voluntary nature of recognition. Part II describes the events that led to the British union movement's campaign for statutory recognition. Part III provides an introduction to the NLRA, and then explains the procedures that an American union must go through before it is recognized. Lastly, Part IV is a discussion of the United Kingdom's recently enacted ERA in light of America's weathered NLRA.

I. GENERAL DEFINITION OF RECOGNITION

A union must be recognized before it can effectively represent any employees.¹³ Once a union is recognized it serves as the bargaining agent for the workers in a particular bargaining unit.¹⁴ An employee may not circumvent the union,¹⁵ because recognition entails a willingness "to negotiate with a view to striking a bargain . . . and this involves a positive mental decision."¹⁶ Thus, the result of recognition in the United States and the United Kingdom is similar, but until recently, as this Note discusses, there was little similarity in the procedures that led up to recognition.

13. See JOHN BOWERS, *EMPLOYMENT LAW* 450 (5th ed. 2000).

14. *Id.* at 451; see generally 29 U.S.C. § 159(a)–(e) (1994).

15. See I.T. SMITH & GARETH THOMAS, *INDUSTRIAL LAW* 558–59 (7th ed. 2000) (discussing the conflicts between individual rights and collective rights). Ultimately, the interests of the union defeat an individual worker's interests. *Id.* at 559.

16. BOWERS, *supra* note 13, at 450. The NLRA defines collective bargaining as the "performance of the *mutual obligation* of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (emphasis added).

II. BRITAIN BEFORE THE ERA

The United Kingdom has twice, unsuccessfully, experimented with statutory recognition schemes in the recent past: from 1971 to 1974 under the Industrial Relations Act, 1971 and from 1976 to 1980 under the Employment Protection Act, 1975.¹⁷ Apart from those failed schemes, recognition for purposes of collective bargaining was entirely voluntary in the United Kingdom, labeled “collective *laissez-faire*.”¹⁸ Employers were only bound by their honor, and were free to ignore written recognition agreements unless the agreements explicitly stated that they were to be legally binding.¹⁹ Unions secured recognition from an employer by persuading the employer that recognition is beneficial, or by threatening industrial action if the majority of the workforce supported such a measure.²⁰ A downside for voluntary recognition was that employers were able to derecognize unions “more or less at will.”²¹

17. NOVITZ & SKIDMORE, *supra* note 8, at 65–72. The first of these attempts, the Industrial Relations Act, 1971 (“IRA”), was enacted under a Conservative government. *Id.* at 65. The IRA offered unions, inter alia, compulsory recognition, but only if the union submitted to a new scheme of registration. *Id.* at 65–66. The Commission on Industrial Relations (“CIR”) aided with determining what constituted a bargaining unit and whether recognition was appropriate. *Id.* at 66. However, ultimate determination lay with the National Industrial Relations Court (“NIRC”). *Id.* The trade union movement regarded this as an attempt to “tame and control” it by placing union activities under statutory constraints. *Id.*

The Labour Party won the 1974 election and repealed the IRA. *Id.* at 67. Thereafter, the Employment Protection Act, 1975 (“EPA”) was enacted, whereby any independent union could apply to the Advisory, Conciliation and Arbitration Service (“ACAS”), which would provide a recommendation for recognition for purposes of collective bargaining purposes. *Id.* at 68. If the employer failed to abide by the ACAS recommendation, there was further ACAS conciliation, or the union could refer the matter to the Central Arbitration Committee (“CAC”), which would impose an award of terms and conditions of employment, to be incorporated in the employment contract. *Id.* at 69. The TUC greeted the EPA with enthusiasm, but employers proved to be quite contrary. *Id.* In sum, employers refused to allow the ACAS access to employees, used propaganda campaigns, threatened to close businesses, and also delayed the process in order to drag it out over a period of years. *Id.* at 69–70.

18. NOVITZ & SKIDMORE, *supra* note 8, at 65; *see also* JULIA LOURIE, HOUSE OF COMMONS RESEARCH PAPER 98/99: FAIRNESS AT WORK, 1998, Cm. 3968, 31 (stating “employer[s] may refuse to recognise a union even where a large majority of the workforce are members”).

19. Nicholas Robertson, *Compulsory Trade Union Recognition: New Rights for Trade Unions in the United Kingdom*, 10 I.C.C.L.R. 303, 303 (1999).

20. LOURIE, *supra* note 18, at 20.

21. *Id.* at 31. Despite the ability to derecognize unions at will, such activity was relatively unknown in Great Britain until the 1980s, remained exceptional as of the mid-1980s, and even today, is not a widespread practice. BRIAN TOWERS, THE REPRESENTATION GAP 52 (1997). From 1988 to 1993, around 150,000 workers were affected by derecognition, more than twice the amount of workers affected by new recognition agreements for the same period. *Id.* However, in the years of 1994–1998, 41,308 workers have been affected by derecognitions compared to

The move back to voluntarism, after Prime Minister Thatcher repealed the 1975 experiment in 1979, did not alarm the trade union movement because voluntarism was a long-standing tradition and trade unions “did not doubt that many managers valued their contributions to communication and co-ordination within the workplace.”²² However, there was an alarming decline in the number of establishments with unions recognized for purposes of collective bargaining agreements—from 64 percent in 1980, to 53 percent in 1990, to 42 percent in 1998.²³ Union density²⁴ has also witnessed a decline from 52 percent in 1980, to 38.1 percent in 1990, and 29.4 percent in 2000.²⁵ Overall, the number of union members has dropped from 11.7 million in 1975 to 7.3 million in 2000.²⁶ Furthermore, a recent study indicates that British managers are progressively adopting American management styles, including less interest in consultation and participation.²⁷

The year 2000, however, was the second year in a row that union membership increased,²⁸ but this increase was statistically insignificant at 0.9 percent.²⁹ The most important statistic is the aggregate downward trend in union membership, a 17.1 percent drop since 1990.³⁰ It

110,490 workers affected by recognitions. Gregor Gall & Sonia McKay, *Developments in Union Recognition and Derecognition in Britain*, 37 BRIT. J. INDUS. REL. 601, 604 (1999). Recently, new recognition agreements have further outpaced derecognitions in terms of employees affected by forty-five to one. LOURIE, *supra* note 18, at 32 (noting the recent “upsurge in recognition agreements, possibly in anticipation of the Labour Government’s legislation”).

22. NOVITZ & SKIDMORE, *supra* note 8, at 61. “Of the 50 largest U.K. companies, 44 recognize trade unions.” FAW, *supra* note 6, para. 4.7.

23. Stephen Machin, *Union Decline in Britain*, 38 BRIT. J. INDUS. REL. 631, 634 (2000). These numbers only include firms with twenty-five or more workers. *Id.*

24. Union density is the proportion of workers who are union members. *Id.* at 632.

25. *Id.* at 633 n.4 (providing the 1980 statistics); Abby Sneade, *Trade union membership 1999-2000: an analysis of data from the Certification Officer and the Labour Force Survey*, 109 LAB. MARKET TRENDS 433, 435 (2001).

26. DEP. OF TRADE & INDUS., NUMBER OF TRADE UNIONS AND UNION MEMBERS; GREAT BRITAIN, 1975-2000, at http://www.dti.gov.uk/er/emar/trade_tables.pdf; Sneade, *supra* note 25, at 435.

27. Towers, *supra* note 7, at 86.

28. Sneade, *supra* note 25, at 435 (stating membership was at 7,152,000 in 1998, 7,257,000 in 1999, and 7,321,000 in 2000).

29. *Id.*

30. *Id.* at 433. There are several theories that account for the decline in unions; however, the overwhelming factor has been the failure to organize new establishments in the last twenty years, with the sharpest decline in private manufacturing facilities. Machin, *supra* note 23, at 631. Other factors are the 1993 decision of *Associated Newspapers Ltd. v. Wilson*, 2 A.C. 454 (H.L. 1995), where the House of Lords determined “that the refusal of a pay raise to those employees who did not wish to give up their collectively bargained terms and conditions was an omission which did not fall within the statutory language of ‘action short of dismissal.’” NOVITZ & SKIDMORE, *supra* note 8, at 34–35. That decision was overruled by the ERA. *Id.* Also, “the

must be kept in mind that these statistics account for both public and private employees, and although the overall union density in Britain is 29 percent, the density in public workplaces is 60 percent compared to 19 percent in private workplaces.³¹

In an effort to stem the rising tide of nonunion workplaces, the Trades Union Congress ("TUC") began a campaign in 1995 for statutory reform to reverse the trend of derecognition with the publication of *Your Voice at Work*.³² This publication "argued that there should be compulsory recognition where the majority of those voting in a workplace ballot were in favour, leading to an award of recognition through a new 'Representation Agency.'"³³ The TUC also sought laws that would ensure that collective bargaining would flow out of any successful recognition because achieving collective bargaining agreements was the TUC's ultimate goal.³⁴ Thus, volunteerism had indeed gone sour and the TUC moved its campaign to the international arena before the International Labor Organization ("ILO") Committee on Freedom of Association ("CFA").³⁵ In one notable example, the Co-Steel Plant at Sheerness refused to grant recognition and threatened dismissal if the workers did not sign individual contracts, even after "a substantial majority of the workforce had opted for union representation through collective bargaining."³⁶ The CFA condemned the absolute void of statutory protection for such workers, and concluded that this was a violation of freedom of association, guaranteed by the ILO, of which Britain is a member.³⁷

When the Labour Party took control of Parliament, it promised the ILO that it was committed to the introduction of a statutory recognition procedure.³⁸ However, Labour had to reconcile this with its commitment to maintaining the "most lightly regulated labour

development of post-Fordist manufacturing practices . . . challenged conventional modes of managing industrial relations." *Id.* at 62.

31. Sneade, *supra* note 25, at 440.

32. NOVITZ & SKIDMORE, *supra* note 8, at 62.

33. *Id.* (quoting TUC, *YOUR VOICE AT WORK*, 11, 29-38 (1995)).

34. *Id.* at 62-63.

35. *Id.* at 63.

36. *Id.*

37. *Id.* Members of the ILO are obligated "to respect, to promote and to realize . . . freedom of association and the effective recognition of the right to collectively [bargain]." INT'L LAB. ORG., DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998), available at <http://www.ilo.org/public/english/standards/decl/declaration/text/>.

38. NOVITZ & SKIDMORE, *supra* note 8, at 63.

market of any leading economy in the world.”³⁹ A key plank for Labour in the 1997 general election, which was echoed in the FAW White Paper, was: “[w]hen . . . [people freely] decide to join [a union] and where a majority of the relevant workforce votes in a ballot for the unions to represent them the union should be recognised. This promotes stable and orderly industrial relations.”⁴⁰ After nearly three years of consultation with employers, unions, and others, the statutory trade union recognition scheme was put in practice on June 6, 2000.⁴¹

III. RECOGNITION UNDER THE NLRA

If statutory recognition is a toddler in the United Kingdom, the NLRA is an elder statesman. The NLRA was originally codified in 1935 and the last major revision was in 1959.⁴² Therefore, American labor and management have been dealing with the same statutory schemes for several generations.

A primary underpinning of the NLRA is the explicit acknowledgment that “certain recognized sources of industrial strife and unrest” are removed “by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment.”⁴³ Representatives, defined by the NLRA as any individual or labor organization,⁴⁴ serve as the exclusive representatives of all employees in a particular bargaining unit once two conditions are met: (1) the bargaining unit is appropriate, and (2) the representatives are chosen by a majority of the employees in such a unit, thus achieving majority status.⁴⁵ Thus, before the procedures that determine whether a majority of employees want representation for purposes of collective bargaining can be

39. FAW, *supra* note 6, foreword.

40. Robertson, *supra* note 19, at 304 (quoting FAW, *supra* note 6).

41. News Release, Department of Trade and Industry, Trade Union Recognition Procedure Begins (June 5, 2000), available at <http://www.dti.gov.uk>.

42. *Supra* note 3.

43. 29 U.S.C. § 151 (1994).

44. *Id.* § 152(4). A labor organization is “any organization . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” *Id.* § 152(5).

45. *Id.* § 159(a).

discussed, the terms “employee” and “appropriate bargaining unit” need to be defined.

It is fair to say that nearly all private-sector enterprises come within the jurisdiction of the NLRB.⁴⁶ The NLRA extends to all enterprises affecting commerce, except for the limitations based upon the definition of employee.⁴⁷ Under section 159(c)(1),⁴⁸ the Board may be petitioned if a question of representation affecting commerce exists, but it is well settled law that the term “affecting commerce” is incredibly broad.⁴⁹ However, the NLRB is permitted to adopt minimum jurisdictional standards, which serve as a “waiver of jurisdiction” if an employer’s volume of business falls below a certain dollar value.⁵⁰

A. *Scope of the NLRA*

The right of employees to engage in collective bargaining is found in section 7 of the NLRA, as amended, which states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities⁵¹

However, section 7 rights are meaningless without a determination of what the term “employee” means. The NLRA defines “employee” with the “circular explanation that the term employee ‘shall include any employee.’”⁵² However, agricultural laborers, domestic servants, independent contractors, supervisors, employees subject to the Railway Labor Act, and public employees (whether they are

46. JULIUS G. GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS* 27 (1988).

47. *See infra* notes 52–55 and accompanying text.

48. 29 U.S.C. § 159(c)(1).

49. *E.g.*, *Amalgamated Ass’n of Street, Elec. Ry. & Motor Coach Employees v. Wis. Employment Relations Bd.*, 340 U.S. 383, 391 (1951). Congress gave the NLRB the fullest permissible jurisdiction under the Commerce Clause. *Glen Manor Home for Jewish Aged v. NLRB*, 474 F.2d 1145, 1148 (6th Cir. 1973). The operation of the NLRA does not depend upon any particular volume of commerce affected more than what courts would consider de minimis. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684 (1951).

50. GETMAN & POGREBIN, *supra* note 46, at 27. The NLRB may not waive jurisdiction for any dispute over which it would assert jurisdiction under its August 1, 1959 standards. 29 U.S.C. § 164(c).

51. *Id.* § 157.

52. GETMAN & POGREBIN, *supra* note 46, at 17 (quoting 29 U.S.C. § 152(3) (1976)).

federal, state, or local) have no protection under the NLRA.⁵³ Overall, approximately 30 percent of the American private-sector labor force is excluded from the NLRA's provisions.⁵⁴ That figure is astounding since, as of 1997, there were 103 million private-sector nonagricultural workers.⁵⁵

B. Determining the Appropriate Bargaining Unit

During an organization drive, a union will limit itself to the portion of employees of a given employer that it feels it has the best chance of successfully organizing.⁵⁶ The concept of an appropriate

53. 29 U.S.C. § 152(3). The Supreme Court uses the common law agency test to define independent contractor. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). The test states that an employee is an independent contractor if he or she has the right of control over the way his or her job is performed. *RESTATEMENT (SECOND) OF AGENCY* § 220 (1958); *GETMAN & POGREBIN*, *supra* note 46, at 17.

The exemption categories that have probably been subject to the most debate and confusion are the supervisory exclusion and the judicially created managerial exclusion. *GETMAN & POGREBIN*, *supra* note 46, at 18-22. Under the NLRA, a supervisor is defined as "any individual having authority, in the interest of the employer . . . [that] requires the use of independent judgment." 29 U.S.C. § 152(11). Yet, the actual exercise of authority is not relevant; rather, existence of authority is enough to fit the exemption. *N.J. Famous Amos Chocolate Chip Corp.*, 236 N.L.R.B. 1093, 1093 (1978). Employees who are nonsupervisory, but who occasionally supervise or substitute for a supervisor, do not achieve supervisory status. *Quik-Pik Food Stores Inc.*, 252 N.L.R.B. 506, 509-10 (1980) (finding that an assistant manager was not a supervisor). *Getman and Pogrebin* note that the general trend in supervisory status has been "towards a greater willingness to find employees to be supervisors." *GETMAN & POGREBIN*, *supra* note 46, at 19; *see also* Stephen Wood & John Godard, *The Statutory Union Recognition Procedure in the Employment Relations Bill: A Comparative Analysis*, 37 *BRIT. J. OF INDUS. REL.* 203, 216 (1999) (noting that the exclusion is broadly drawn to cover "positions with even minimal supervisory content").

The managerial exemption was created to account for any possible gaps between the supervisory exemption and high officials that do not have a per se supervisory role. *GETMAN & POGREBIN*, *supra* note 46, at 19. Thus, the managerial exemption includes all executive employees who "formulate, determine and effectuate management policies." *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946). The Supreme Court adopted this definition in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974), excluding all such employees. The Supreme Court applied the managerial exemption to university faculty in *NLRB v. Yeshiva University*, 444 U.S. 672, 689-90 (1980). However, exclusion from the NLRA does not necessarily mean that there are no other avenues to statutory recognition.

54. George Strauss, *Is the New Deal System Collapsing? With What Might it be Replaced?*, 34 *INDUS. REL.* 329, 339 (1995).

55. Henry S. Farber, *Union Success in Representation Elections: Why Does Unit Size Matter?*, 54 *INDUS. & LAB. REL. REV.* 329, 331 (2001) (citing 1997 Current Population Survey).

56. *GETMAN & POGREBIN*, *supra* note 46, at 22 (providing examples that include an entire employer's workforce, single departments, or certain locations of an employer's business). However, the NLRA specifically states that professional employees, as defined in 29 U.S.C. § 152(12), are not to be included with nonprofessionals "unless a majority of such professionals vote for inclusion in such unit." 29 U.S.C. § 159(b)(1). Also, under the NLRA, guards may not be included in a bargaining unit that includes nonguards, and guard unions may not be affiliated with nonguard unions. 29 U.S.C. § 159(b)(3) (1994).

unit is critical because a union will commit its resources to organizing the largest unit that it thinks will succeed, and an election failure means that the union must wait an entire year before petitioning for a new election.⁵⁷ Once a union determines the makeup of a potential unit, it will begin its organization drive, seeking to obtain pledges of support from the particular unit.⁵⁸

The union then has two routes it can take. First, the union can request recognition from the employer, but the employer will almost always reject the request for recognition.⁵⁹ Second, employees, their representative, or an employer can initiate a representation case by filing a petition with the Board.⁶⁰ If filed by employees or a union, the Board requires a showing that at least 30 percent of the employees desire representation.⁶¹ An employer may only file a petition upon a showing that one or more unions have demanded recognition.⁶² If the Board determines that there is a "question of representation," it will conduct a hearing to determine whether the unit being sought is appropriate.⁶³ An employer may also petition the Board to review the regional director's decision, which typically involves a month-long

57. 29 U.S.C. § 159(c)(3); GETMAN & POGREBIN, *supra* note 46, at 22.

58. GETMAN & POGREBIN, *supra* note 46, at 22. These pledges usually take the form of signed authorization cards designating the union as their bargaining representative. *Id.*

59. *Id.* at 23.

60. 29 U.S.C. § 159(c)(1)(A), (B).

61. 29 C.F.R. § 101.18 (2002). The 30% threshold was designed to protect the NLRB's resources, not as a tool to prevent employers from hardship; therefore, the employer is not permitted to contest the showing of adequacy of interest or to inspect the authorization cards. *NLRB v. J.I. Case Co.*, 201 F.2d 597 (9th Cir. 1953); JOHN D. FEERICK ET AL., *NLRB REPRESENTATION ELECTIONS* § 6.3.1 (1980 & Supp. 1983).

62. 29 U.S.C. § 159(c)(1)(B).

63. *Id.* § 159(b); GETMAN & POGREBIN, *supra* note 46, at 23. The NLRB has delegated much of the task of unit determination to its regional directors. *See* GETMAN & POGREBIN, *supra* note 46, at 23. A hearing officer will conduct a hearing, focusing on the employer's labor relations policies and the employees' duties. *Id.* Being primarily factual hearings, and because many hearing officers are not experts at conducting hearings, the officers permit "considerable leeway in the evidence submitted." *Id.* This process can last for weeks. *Id.*

After the hearing concludes, the parties submit briefs to the regional director, who decides whether the unit is appropriate, and if so, which employees should be included. *Id.* However, the employer may petition for review by the NLRB, under 29 U.S.C. § 159(b) if it is dissatisfied with the regional director's decision. *Id.* Employers act strategically by weighing the chances of the union winning an election for its desired unit, the costs of delaying representation, and the quickest election in which the union will be defeated. *Id.* Therefore, employers will often agree to an election in a unit at a time they feel is most favorable for them. *Id.* The NLRB's rate at obtaining agreement between parties as of June 5, 1988 is 87.7%. Gould, *supra* note 5, at 15; *see also* GETMAN & POGREBIN, *supra* note 46, at 24 (noting that NLRB personnel encourage agreement and generally do not use their statutorily permitted power to set the terms of the elections, which are at times for units that are more favorable to the employer).

delay.⁶⁴ Moreover, if the Board grants the petition, the delay may extend past eight months.⁶⁵ The problem of delay at the Board has a direct relationship to the employees' interest in unionization; therefore, employers often use these legal tactics to stretch out the process and induce disinterest.⁶⁶

If the regional director or the Board has to decide whether a unit is appropriate, he or she must determine whether the employees share a "community of interest."⁶⁷ The existence of a community of interest depends on "a variety of factors: methods of compensation, hours of work, employment benefits, supervision, training and skills, job functions and situs, contact and interchange with other categories of employees, integration of work functions, and bargaining history."⁶⁸ Section 159(c)(5) of the NLRA provides that the "extent to which the employees have organized shall not be controlling";⁶⁹ however, NLRB practice has allowed the extent of organization as a factor in designating a unit appropriate, but not to make an otherwise inappropriate unit appropriate.⁷⁰ Furthermore, the NLRB has developed a list of presumptions that are employed to help make bargaining unit determinations.⁷¹ When more than one union is competing for interrelated or overlapping employee groups, the NLRB will use the factors listed above in its determination, but it will also take into account the employees' wishes.⁷²

Once the appropriate unit has been determined, "the Board issues a direction of election that describes the unit, resolves questions

64. GETMAN & POGREBIN, *supra* note 46, at 23.

65. WILLIAM B. GOULD IV, AGENDA FOR REFORM 160 (1993) (stating that in 1990 the median amount of days before the NLRB granted a decision was 309 days).

66. *Id.* at 158.

67. GETMAN & POGREBIN, *supra* note 46, at 24 (quoting Kalamazoo Paper Box Corp., 136 N.L.R.B. 134 (1962)).

68. GETMAN & POGREBIN, *supra* note 46, at 25. Although substantial weight is given to bargaining history, it is not always dispositive. Compare Buffalo Broad. Co., Inc., 242 N.L.R.B. 1105, 1106 n.2 (1979), with Rainbow Lithographing Co., 69 N.L.R.B. 1383, 1385 (1946) (stating that bargaining was not decisive where a group had an ongoing objection to inclusion in a unit).

69. 29 U.S.C. § 159(c)(5) (1994).

70. GETMAN & POGREBIN, *supra* note 46, at 25.

71. *Id.* (arguing that "[t]he most significant of the Board's presumptions and one that is helpful to unions is that in most industries a single facility is presumptively appropriate"). This presumption is helpful to union success in representation elections because data provides that unions are more successful in small units. Farber, *supra* note 55, at 345; see also GETMAN & POGREBIN, *supra* note 46, at 26.

72. GETMAN & POGREBIN, *supra* note 46, at 26. This is done through a self-determination election. *Id.*

of voter eligibility, and sets an election date.”⁷³ The practice is to hold elections no sooner than twenty-five days after the order for an election.⁷⁴ As of 1997, over 50 percent of elections occur within forty-two days.⁷⁵

C. *Determining Majority Support*

An employer is free to recognize the union’s desired majority without an election, but this route is rarely taken.⁷⁶ The employer has an almost unlimited right to demand an NLRB election before recognizing the union as the legitimate representative of the bargaining unit.⁷⁷ The Board supervises elections, but unions and employers influence the procedures as well.⁷⁸

The election campaign must not be confused with an American political campaign because there are wide disparities in the levels of access both parties have to the workers in a bargaining unit. Although employees are able to solicit other employees at work during nonworking times, employers may make antiunion speeches during work time without permitting the union to respond.⁷⁹ However, the union may respond if the “Board could find a violation where it

73. Becker, *supra* note 5, at 516 n.91.

74. Gould, *supra* note 5, at 18.

75. *Id.*

76. Becker, *supra* note 5, at 507. During the first five years of the NLRA, the NLRB “did not hesitate to certify unions as the ‘exclusive representative’ of employees in the absence of an election.” *Id.*

A common criticism of the NLRA is that the NLRB should grant certification once a majority of employees in an appropriate bargaining unit have signed authorization cards. *E.g.*, GOULD, *supra* note 65, at 177 (suggesting, however, a 60% threshold to account for fears of peer pressure and the like). Data suggests that signing of a card is a good indication of the employee’s choice. JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS 132 (1976). In fact, prior to the Taft-Hartley Amendments in 1947, the NLRB sometimes certified unions based on authorization cards. GOULD, *supra* note 65, at 162.

77. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 310 (1974). *But see* *NLRB v. Gissel*, 395 U.S. 575, 600 (1969) (noting that an employer may not insist on a secret ballot election if he engages in “unfair labor practices likely to destroy the union’s majority and seriously impede the election” (quoting Brief for Petitioner at 36)); Becker, *supra* note 5, at 521–46 (arguing that representation elections are between the union and the employees, and entitling employers to campaign like candidates masks the inequality of bargaining power which the NLRA tries to overcome; additionally noting that in the 1977 attempts at reforming the NLRA, a provision eliminating employers from campaigning was central in the legislation’s defeat).

78. Becker, *supra* note 5, at 516 n.91 (explaining that there will be a pre-election conference, where the parties will consider the location of the polls, the hours the polls will be open, and other matters).

79. GETMAN & POBREGIN, *supra* note 46, at 38–41. However, an employer may not threaten reprisal. *See Gissel*, 395 U.S. at 618.

concluded that the employer's refusal to grant equal time 'truly diminished the ability of the labor organizations involved to carry their messages to the employees' or created an imbalance in the opportunities for organization communication."⁸⁰ In *Lechmere, Inc. v. NLRB*, the United States Supreme Court allowed employers in most instances to exclude union non-employee organizers from the relevant workplace.⁸¹ However, employers must make available lists of names and addresses of eligible voters prior to the elections.⁸²

The disparity in access is apparent: the employers have years to make the argument that unionization is bad, yet unions must rely on informal discussion between employees. Therefore, employees do not have freedom of choice between two viable routes, since one of those routes provides limited ability to communicate the benefits of unionization.

Elections take place by a formal secret ballot,⁸³ and the losing party may file objections arguing that the other side or a third party influenced the outcome of the election by violating the rules.⁸⁴ The Board will conduct a hearing if any of the objections or challenges are outcome determinative.⁸⁵ Once the results are final, the Board certifies them to the parties.⁸⁶ If the union wins, it will become the exclusive representative of all the employees in the bargaining unit.⁸⁷

IV. RECOGNITION UNDER THE EMPLOYMENT RELATIONS ACT

In the foreword of FAW, from which the ERA emanated, Prime Minister Blair was very frank when he stated: "There will be *no going back*. The days of strikes without ballots, mass picketing, closed shops and secondary action *are over*."⁸⁸ He also stated: "Even after the changes we propose, Britain will have the *most lightly regulated*

80. GETMAN & POBREGIN, *supra* note 46, at 41 (quoting *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 363 (1958)).

81. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992).

82. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1245 (1966).

83. 29 U.S.C. § 159(c)(1) (1994).

84. Becker, *supra* note 5, at 516 n.91 (explaining that the conduct of the participants from the time the petition is filed until the polls close is governed by a set of Board rules). See generally FEERICK ET AL., *supra* note 61, at 465-651.

85. Becker, *supra* note 5, at 516 n.91.

86. *Id.*

87. GETMAN & POGREBIN, *supra* note 46, at 16, 29.

88. FAW, *supra* note 6, foreword (emphasis added).

labour market of any leading economy in the world.”⁸⁹ These are very strong words, but they are not without precedent. What Prime Minister Blair had in mind, most likely, was the worry of being associated with the mass strikes and pickets that occurred during the “Winter of Discontent.”⁹⁰ In fact, the Conservatives raise the fears of a “journey back to strife” during any drive for prounion reforms.⁹¹

The portions of the ERA relevant to this Note, section 1 and schedule 1, were inserted into the Trade Union and Labor Relations (Consolidation) Act, 1992 (“TULRCA”).⁹² The statutory recognition procedures exist as a last resort, or as the government stated in FAW, for the “very small minority of cases . . . [after] the prospects of voluntary agreement [have been exhausted].”⁹³ Thus, the procedures, for the most part, “try . . . to edge the parties into voluntary, collective agreements without resort to legal sanction—a traditional tactic of collective *laissez-faire*.”⁹⁴ The overall preference for voluntary agreements is grounded in the notion that they are the best way to

89. *Id.* (emphasis added).

90. NOVITZ & SKIDMORE, *supra* note 8, at 133. The “Winter of Discontent” was “a series of mainly public sector strikes in 1978-9,” which gave rise to the belief that Labour was not in control of Great Britain, despite its control of Parliament, and was at fault for excessively powerful unions. *Id.* at 7. Moreover, these strikes damaged the public’s opinion of unions, which helped to account for, if not take complete responsibility for, Mrs. Thatcher’s electoral victory in 1979. TOWERS, *supra* note 21, at 54.

However, popular history failed to note that the regulations on industrial action, as consolidated in the Trade Unions and Labour Relations Act, 1974 (“TULRA”) nearly mirrored those of the Trade Disputes Act, 1906, which was a codification of the “Golden Rule,” which granted immunity from civil claims for unions when “acting in contemplation or furtherance of a trade dispute.” TOWERS, *supra* note 21, at 49 (noting that this immunity was greatly circumscribed from 1982 as part of Mrs. Thatcher’s “reforms”); NOVITZ & SKIDMORE, *supra* note 8, at 7. Thus, the massive strikes which occurred in 1978 and 1979, the “Winter of Discontent,” were not made possible because of some sort of radical legislation enacted by Labour; rather, the laws governing industrial action had existed since 1906, except for the years between 1971 and 1974. *Id.*

91. NOVITZ & SKIDMORE, *supra* note 8, at 7–8 (quoting 312 PARL. DEB., H.C. (6th ser.) (1998) 1106).

92. Bob Simpson, *Trade Union Recognition and the Law, a New Approach—Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992*, 29 INDUS. L.J. 193, 194 (2000).

93. FAW, *supra* note 6, para. 4.11. The procedures were intentionally designed to keep cases from reaching the final stage. NOVITZ & SKIDMORE, *supra* note 8, at 77.

94. Lord Wedderburn, *Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition*, 29 INDUS. L.J. 1, 2 (2000).

build partnerships.⁹⁵ Yet, this preference is nothing new—it merely perpetuates the status quo.⁹⁶

The attack on unions by Conservative government policy between 1979 and 1997 has been described as “probably the most single-minded and sustained attack on the position of a major and previous legitimate social force to have been undertaken anywhere under modern democratic conditions.”⁹⁷ One observer credits the ERA as radical in one way, because “it halts, and marginally reverses, the seemingly inexorable tide of anti-union legislation from 1980 to 1993.”⁹⁸ Does this new procedure, which does not attempt to create a new legal framework, live up to the name of the white paper that introduced it, that is, *Fairness at Work*?

A. Scope of the ERA

The ERA provides rights to “workers” rather than “employees,”⁹⁹ defining workers as “employee[s], or anyone else who works personally for another party other than in circumstances where that party is a professional client of that individual.”¹⁰⁰ It has yet to be seen how broad this definition is, but it certainly encompasses more workers than the NLRA does because, for instance, there are no managerial, public, or supervisory exceptions.¹⁰¹

The ERA opens up with controversy because there is a threshold level that exempts workplaces with less than twenty-one employees.¹⁰²

95. NOVITZ & SKIDMORE, *supra* note 8, at 76.

96. Paul Smith & Gary Morton, *New Labour's Reform of Britain's Employment Law: The Devil is not only in the Detail but in the Values and Policy Too*, 39 BRIT. J. OF INDUS. REL. 119, 120 (2001).

97. *Id.* (quoting Colin Crouch, *Atavism and Innovation: Labour Legislation and Public Policy since 1979 in Historical Perspective*, 2 HIST. STUD. IN INDUS. REL. 111, 120 (1996)).

98. Towers, *supra* note 7, at 83.

99. Employment Relations Act, 1999, c. 26, § 13 (Eng.). This is “[i]n common with the trend in recent U.K. legislation.” Robertson, *supra* note 19, at 305.

100. Employment Relations Act, 1999, c. 26, § 13 (Eng.). This broad definition will encompass many “atypical” workers. Robertson, *supra* note 19, at 305.

101. Yet, keep in mind that public employees generally can unionize and collectively bargain under other statutory schemes.

102. Employment Relations Act, 1999, c. 26, sched. 1, para. 7 (Eng.) (stating that the number of workers is assessed both on the date on which the employer received the request and over a thirteen week average up to that date and the ERA will apply if the employer has twenty-one or more workers under either test). This threshold number is subject to variation if the Secretary sees fit. ERA, Sched. 1, para. 7. The ERA also requires the court to take into account any workers of associated employers whom are working in Great Britain (except for Northern Ireland). *See id.* Sched. 1, para. 7. Employers are associated “if the direct or indirect holding or subsidiary company of the first employer or employers are controlled directly or

There were, however, several failed amendments that sought to raise the threshold to fifty.¹⁰³ The government's proffered reason for the threshold was that "small firms may be different in that they are often managed on a personal basis and collective bargaining may be inappropriate,"¹⁰⁴ and employers are still free to recognize the unions if they so choose.¹⁰⁵ However, this argument is rebutted by the fact that statutory recognition exists to protect the most vulnerable members of society, and therefore employees should not be excluded because they work for a small firm.¹⁰⁶ The TUC, not surprisingly, opposes the small employer exclusion on the grounds that one-fifth of the private-sector workforce would be denied the protections of the ERA, amounting to 4.593 million workers.¹⁰⁷ However, when the entire workforce is accounted for, 8.1 million workers are excluded, amounting to 31 percent of the workforce.¹⁰⁸

Union density at workplaces with fewer than twenty-five employees (the only statistics available) overall in 2000 was 16 percent.¹⁰⁹ Out of that 16 percent, private workplaces had a density of 9 percent compared to 51 percent at public workplaces.¹¹⁰ Compare these figures to workplaces with twenty-five or more employees, which have 25 percent density for private workplaces and 62 percent density for public workplaces.¹¹¹ This evidence demonstrates that small businesses may indeed be different, but the likely reason for the small-employer exclusion was more "political pragmatism than principle,"¹¹² which was likely, given the employer opposition against the recognition procedure as a whole upon its introduction.¹¹³ The

indirectly by a third party." Robertson, *supra* note 19, at 304. This is to ensure that employers cannot evade the ERA by merely splitting up the workforce. *Id.*

103. Simpson, *supra* note 92, at 195 n.10.

104. *Id.* at 196 (quoting HC Standing Committee E, col. 347 (16.3.99), *per* Mr. Wills, Minister for Small Firms).

105. *Id.*

106. *Id.* Workers in small firms "tend to have relatively high levels of satisfaction, but at the same time find themselves lowly paid, and industrial tribunal applications are also relatively high in respect of such workers." NOVITZ & SKIDMORE, *supra* note 8, at 84.

107. TUC, *supra* note 9, para. 23, 25. (noting that this exclusion would discriminatorily impact women and minorities).

108. Simpson, *supra* note 92, at 196.

109. Sneade, *supra* note 25, at 440.

110. *Id.*

111. *Id.*

112. Simpson, *supra* note 92, at 196.

113. Wood & Godard, *supra* note 53, at 237 (noting that all of the major differences between the White Paper and the Employment Relations Bill represent employers' preferences).

TUC noted that there would not be a regulatory burden placed on small firms because the procedure for obtaining recognition by showing majority membership provides a particularly appropriate procedure for small firms and does not require a ballot.¹¹⁴

The NLRA does not contemplate such an exemption, except for jurisdictional yardsticks that have been frozen since 1959. Some have argued that a small-employer exclusion should be added to the NLRA, but Congress has not acted.¹¹⁵ Data from NLRB elections from 1952–1998 demonstrate that there were 61,107 elections at workplaces with between one and nine workers and 56,050 elections at workplaces with ten to nineteen workers.¹¹⁶ Electoral success was 63 percent and 58 percent respectively, and success rates for workplaces with twenty to forty-nine workers, fifty to ninety-nine workers, and more than one hundred workers were 53 percent, 49 percent, and 44 percent respectively.¹¹⁷ Thus, in America, union electoral success is inversely proportional to the size of the workplace.¹¹⁸

Do these numbers correlate with the experience in the United Kingdom? In fact, the exact opposite trend exists.¹¹⁹ Data from 1980 to 1998 show that recognition success rates are directly proportional to establishment size.¹²⁰ Nevertheless, the exclusion “exposes the conflict between the democratic case for the individual employee’s right to representation (even if required to be collectively endorsed) and the case for the encouragement of small enterprises on the grounds of their contribution to economic efficiency and growth through minimal regulation.”¹²¹ Therefore, the union movement must look elsewhere to convert membership decline into growth.

In the absence of removing the small-employer exception, the TUC urges the government to make it grounds for unfair dismissal if “the reason, or principle reason was to reduce the workforce below 21.”¹²² The TUC believes that there would not be a regulatory burden placed on small firms because the procedure for obtaining recognition

114. TUC, *supra* note 9, at para. 27.

115. Gould, *supra* note 5, at 13.

116. Farber, *supra* note 55, at 347.

117. *Id.* at 346.

118. MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 151 (1987).

119. See Simpson, *supra* note 92, at 196.

120. *Id.*

121. Towers, *supra* note 7, at 87.

122. TUC, *supra* note 9, para. 28.

by showing majority membership provides a particularly appropriate procedure for small firms and does not require a ballot.¹²³

*B. Requesting Recognition from the Employer*¹²⁴

As previously stated, the United Kingdom still aims to secure voluntary agreement, but if attempts at such agreement are unsuccessful, unions are able to apply to the Central Arbitration Committee ("CAC") to determine the appropriate bargaining unit and whether a majority of the workers in that unit support recognition.¹²⁵ The first stage for securing recognition is for a union to make a request to the employer for recognition.¹²⁶ Following such a request, a ten-day period is imposed during which the union may not seek assistance from the CAC.¹²⁷ It is assumed that during those ten days the employer and the union will attempt to reach a voluntary agreement.¹²⁸

The employer has two options during the ten-day period: it can ignore the union, which permits the union to request assistance from the CAC, or it may agree to negotiate with the union over the appropriate bargaining unit and recognition—extending the time that the union has before applying to the CAC by twenty days.¹²⁹ Assuming that the parties cannot hammer out a voluntary recognition agreement, they enter the next stage. Under current labor law practice in America, these procedures would do little to aid parties at coming to an agreement, since recognition almost always is the product of an NLRB election.¹³⁰

123. *Id.* para. 27.

124. At any time during the procedure the employer may voluntarily agree to recognize the union.

125. Simpson, *supra* note 92, at 199–203.

126. Employment Relations Act, 1999, c. 26, sched. 1, para. 4–8 (Eng.) (stating that there are various requirements in the request, including the identification of the proposed bargaining unit).

127. Simpson, *supra* note 92, at 199.

128. *Id.*

129. *Id.* At this time, either party may request the help of the ACAS, which has over twenty-five years experience in helping to resolve industrial disputes to aid in negotiations. *Id.* at 199–200. Lastly, both parties can agree to extend negotiations indefinitely. Employment Relations Act, 1999, c. 26, sched. 1, para. 10 (Eng.).

130. See generally Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 15 BERKELEY J. EMP. & LAB. L. 50 (1994) (discussing how employers often invoke the NLRB election procedure because of delays and possible litigation over a plethora of details as a strategy to avoid recognition rather than an interest in the workers' true desires).

C. Application to the CAC

Applications may be made to the CAC for the determination of both a proper bargaining unit and whether the union has majority support in the bargaining unit.¹³¹ However, if the parties have determined an appropriate bargaining unit but not agreed on recognition, paragraph 12(4) of the ERA permits the CAC to only determine whether there is majority support within the bargaining unit.¹³²

1. Determining the Appropriate Bargaining Unit

The “overriding criterion” for determining an appropriate bargaining unit “is ‘the need for the unit to be compatible with effective management.’”¹³³ Five other matters can be taken into account, but they are subordinate to the overriding criterion.¹³⁴ The other matters are

- (a) the views of the employer and the union (or unions); (b) existing national and local bargaining arrangements; (c) the desirability of avoiding small fragmented bargaining units within an undertaking; (d) the characteristics of workers falling within the proposed bargaining unit and of any other employees of the employer whom the CAC considers relevant; [and] (e) the location of the workers.¹³⁵

There is no prohibition on considering other issues as well.¹³⁶ The goal under this method of determination is to find a middle ground between management’s concern with its organizational structure “and the worker’s desire for a [bargaining unit] which fitted solidarity or a sense of common purpose between different workgroups.”¹³⁷

On its face, the provisions controlling the appropriateness of a bargaining unit are much more favorable to British employers than the unions when compared to the American community of interest definition of a bargaining unit. The British emphasis on effective management stifles “broader-based” bargaining, and permits the employer to have a great degree of “influence in determining the scope of the workforce balloted for recognition.”¹³⁸ This is what the

131. Simpson, *supra* note 92, at 201.

132. *Id.* at 201–02.

133. *Id.* at 205 (quoting Employment Relations Act, 1999, c. 26, sched. 1, para. 19(3)(a) (Eng.)).

134. *Id.*

135. Employment Relations Act, 1999, c. 26, sched. 1, para. 19(3)(b) (Eng.).

136. Simpson, *supra* note 92, at 207.

137. *Id.* at 206–07.

138. NOVITZ & SKIDMORE, *supra* note 8, at 90.

Confederation of British Industries (“CBI”) wanted, and the government claimed “that this is ‘a modern definition of recognition,’ ‘tailored for single-status, single-table bargaining workplaces, *if that is what the employer wants.*’”¹³⁹ While admitting that the CAC to date has done a good job, the TUC fears that the effective management clause will prejudice applications from larger workplaces.¹⁴⁰ A more democratic approach to determining the appropriateness of a bargaining unit would be to balance both the views of management as well as the views of the union, rather than subordinating everything to effective management.

2. Determining Majority Support

The CAC will declare recognition in one of two ways. First, if the CAC is satisfied that a majority of workers in the bargaining unit are already members of the union seeking recognition, the CAC is required to issue a declaration that the union is entitled to conduct collective bargaining on behalf of the workers in that unit.¹⁴¹ Yet, due in part to CBI lobbying efforts, as well as the fact that bargaining units are to a great extent determined by management, it is unlikely that this route will be used often.¹⁴² Second, the ERA permits the CAC to hold a ballot, despite the majority status, in three situations: (1) when it is in the interests of good industrial relations, (2) when a significant number of workers do not want the union, or (3) when “membership evidence” is produced which leads to doubts about whether a significant number of workers want the union.¹⁴³ Membership evidence is evidence regarding the circumstances in which workers joined the union, as well as the duration of their membership.¹⁴⁴

An employer that does not wish to have a union will likely introduce to the CAC reasons why a ballot is still necessary. This provision has the potential to work like a virtual *Linden Lumber*,¹⁴⁵ permitting elections whenever the employer requests. The CAC would “be courting an application for judicial review of its decision” if

139. *Id.* (quoting HC Standing Committee E, 16 Mar. 1999, col 347, *per* Mr. Wills) (emphasis added).

140. TUC, *supra* note 9, para. 36.

141. Simpson, *supra* note 92, at 208.

142. *Id.*

143. *Id.* at 209.

144. *Id.*

145. *Supra* note 77 and accompanying text.

there was strong employer opposition to recognition.¹⁴⁶ Therefore, it is likely that most recognition cases will be determined by ballot.

If recognition is not automatic because of a lack of majority membership or the existence of one of the three aforementioned categories, the parties have ten days to come up with an agreement as to voluntary recognition or notify the CAC that they want a secret ballot to determine whether the workers want the union.¹⁴⁷ The members of the applicant union must constitute at least 10 percent of the workers in the appropriate bargaining unit.¹⁴⁸ This is far more favorable to unions than the 30 percent threshold in America.¹⁴⁹ But the ERA has a provision unlike anything in the NLRA: the ERA requires the CAC to be satisfied that a majority of workers in the unit are likely to favor recognition.¹⁵⁰ This can be achieved through petition as well as evidence of greater than 50 percent union membership.¹⁵¹ The problem with petitions, however, is the difficulty with gaining access to the employees.¹⁵²

At this stage, the employer assumes three duties: (1) the duty to cooperate with the scrutineer and the union,¹⁵³ (2) the duty to permit the union access to the workers constituting the bargaining unit to canvass support,¹⁵⁴ and (3) the duty to supply the names and addresses of all workers in the bargaining unit to the CAC.¹⁵⁵ These duties are extremely important, and if the employer breaches any of the them, the CAC can issue a declaration by default to the union, regardless of whether there was majority support,¹⁵⁶ in a similar vein to a *Gissel* bargaining order.¹⁵⁷

146. Simpson, *supra* note 92, at 209.

147. *Id.* at 209–10.

148. NOVITZ & SKIDMORE, *supra* note 8, at 91.

149. *Id.* CBI's first proposal was 30%. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Simpson, *supra* note 92, at 210–11. The scrutineer receives the names and addresses as well, and if the union wishes, the scrutineer will disseminate any union materials to the electorate. Employment Relations Act, 1999, c. 26, sched. 1, para. 26 (Eng.).

154. Simpson, *supra* note 92, at 211

155. *Id.* (noting, however, that the employer does not have a duty to supply names to the union directly out of the right to privacy under Article 8 of the European Convention on Human Rights).

156. *Id.* at 211–12.

157. *Supra* note 77. If an employer has committed an unfair labor practice so serious that it renders a *fair and free election impossible*, the Board may order the employer to bargain with the union that has shown majority support even though the union has not won an election. *NLRB v. Gissel*, 395 U.S. 575, 600, 614 (1969).

The second duty, on-site access, depends on workforce demand and the fear of an unacceptable increase in workplace tension.¹⁵⁸ The employer's custom and practice in communicating to the workplace its opposition to recognition will be the criteria for determining how much access unions will be permitted.¹⁵⁹ The American experience with legal procedures for trade union recognition is that "determined employer opposition to union recognition manifests itself most strongly in the pressures put on workers before a ballot on recognition is held."¹⁶⁰ However, although the ERA's provisions for union access to employees are inadequate by ILO standards,¹⁶¹ the ERA provides the union more of a voice in the workplace than its American counterpart because union organizers in America can be completely barred from access in most situations.¹⁶² Yet by the time a union has access, that is, after the 10 percent threshold and likelihood of a majority have been established, it may be too late to overcome an employer strongly opposed to granting recognition.¹⁶³

The British election procedures have one other twist that is absent in NLRB elections. Forty percent of the relevant bargaining unit must actually participate in the election.¹⁶⁴ If such numbers were required in British and American political elections, there would be few politicians in office. Why should the employees who do not choose to vote control the outcome to a certain extent? This threshold is better than the Conservative proposal, which was a 50 percent threshold, but the TUC points out that the 2001 British general election would have come out differently had abstentions been counted against the government.¹⁶⁵ The 40 percent threshold may in fact maximize turnout, but part of an election is that one votes—abstention should not be given any power.

158. Simpson, *supra* note 92, at 211.

159. *Id.*

160. *Id.* at 210.

161. NOVITZ & SKIDMORE, *supra* note 8, at 99 (noting that the ILO states that a "union should have basic rights of access to the workplace and to management representatives, regardless of recognition").

162. *Supra* note 80 and accompanying text.

163. NOVITZ & SKIDMORE, *supra* note 8, at 99.

164. *Id.* at 94.

165. TUC, *supra* note 9, para. 44.

CONCLUSION

The Labour Party has distanced itself from its historical constituency of trade unionists. This distancing has occurred for two reasons. The first has been a purposeful departure from being associated with the strikes of the 1970s, and the second is the fact that unions are losing power in society due to their diminishing numbers. In fact, Labour's return to power has been a result of its new appeal to business interests and "middle England."¹⁶⁶ *Fairness at Work* demonstrates "New Labour's" commitment to a fair and profitable society, but it does not attempt to change the industrial relations status quo in any radical way. One comment that can be said about the new statutory recognition procedure in the United Kingdom is that it is at least marginally better than the system before 1997. The NLRA is a virtual dinosaur, nearly impossible to amend due to political realities.¹⁶⁷ However, it is hard to say whether British industrial relations laws have made up for the faults with respect to the NLRA.

Labour could not act in a political vacuum because any reforms could instantly be swept away if the Conservative Party took the reigns of government once again. Therefore, many of the reforms that the TUC wants may be nothing but dreams. The political structure of the United Kingdom permits successive governments to overturn prior enactments with relative ease, yet this is not the case in America, particularly with respect to the NLRA.

The NLRA

was designed to form a framework for the growth of recognition and collective bargaining and normally on a voluntary basis. This was the experience of the period before the passage of the Act and setting up of the NLRB. Trade union gains in that period must largely be explained by the successes of the industrial unions in the Congress of Industrial Organisations and the stimulus it gave to the entire labor movement. Even after the passage of [the NLRA] the unions won their big recognition successes at General Motors and Ford through their own strength, without assistance of the NLRB.¹⁶⁸

166. Towers, *supra* note 7, at 92.

167. The NLRA has a number of critics in America, including some who believe that it is now responsible for the demise of unions in America. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. Rev. 939, 942-43, nn.10-11 (1995). Despite vast changes in technology as well as economic and industrial organization, the NLRA has remained virtually unchanged since 1947. *See id.* at 942 n.7.

168. Towers, *supra* note 7, at 86.

Thus, statutory recognition is not necessarily a panacea to avert the diminishing levels of unionization.

The United Kingdom's new statutory recognition procedure does no more than what FAW stated: it provides a backdoor for unions when an employer refuses to recognize them under any circumstances. Recognition in the United Kingdom and America suffers from long delays, which can be great for employers seeking to undermine a union's popularity as well as limit its access to the workforce. However, it is fair to say that the delays under the British scheme are far more manageable than in America.

The good news is that voluntary recognition is on the rise, and has been for several years. In fact, over 340 new agreements were signed in both 1999 and 2000 compared to just over one hundred in 1998.¹⁶⁹ Other than that, the observer must wait and see whether this wave of recognition is the product of a positive change in British industrial relations, or whether employers are preferring to have their terms recognized rather than government imposed bargaining unit structures and the like. I tend to believe that employers are opting for the latter because of the greater influence of American management tactics entering the British workplace.

169. Gregor Gall & Sonia McKay, *Facing 'Fairness at Work': Union Perception of Employer Opposition and Response to Union Recognition*, 32 INDUS. REL. J. 94, 110-11 (2001).